BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KAY REH,	:	
Claimant,	:	File No. 5064617
vs.	:	A R B I T R A T I O N
TYSON FRESH MEATS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1402.30, 2502, 2907

STATEMENT OF THE CASE

Kay Reh, claimant, filed a petition for arbitration against Tyson Fresh Meats, Inc., as the self-insured employer. This case came before the undersigned for an arbitration hearing on August 29, 2019, in Waterloo.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 6, and Defendant's Exhibits A through K. All exhibits were received without objection.

Claimant testified on his own behalf. Defendant called Mary Jones to testify. The evidentiary record closed at the conclusion of the evidentiary hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on October 17, 2019. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on June 3, 2016 or May 23, 2018, which arose out of and in the course of his employment.

2. Whether the claim of injury on June 3, 2016 is barred by the statute of limitations.

3. Whether the claim for either date of injury is barred by claimant's alleged failure to give timely notice.

4. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary total, or healing period, benefits.

5. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to industrial disability, or permanent partial disability, benefits.

6. The proper commencement date for permanent partial disability benefits, if any are awarded.

7. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Kay Reh is a 35-yeard-old gentleman, who is a native of Thailand. Mr. Reh came to the United States in 2009 and has lived in Waterloo, Iowa since 2016. Mr. Reh speaks only limited English and cannot read or write in English.

Mr. Reh started working at Tyson in 2012. Claimant testified that he had no prior injuries before starting his employment with Tyson. He started his employment with Tyson as a ham skinner. In that position, a conveyor would bring the ham to his workstation and it would fall into a box. Claimant would reach to retrieve the ham and slide it right to left. He would then use the skinning wheel to skin the cut of meat.

Claimant worked the ham skinner position for approximately six months. Unfortunately, he developed low back symptoms performing that job in 2013. He reported the symptoms and Tyson moved him to a ham boning position. Claimant's symptoms resolved and he continued working for Tyson without medical restriction.

In the ham boning position, claimant used a knife to cut meat off the bone. He held this job through the date of his alleged May 23, 2018 injury. During this period, claimant would occasionally be required to return to the ham skinner position.

In early 2016, claimant developed low back symptoms again. Mr. Reh testified that the cause of his back pain was the ham skinner position. He testified that the ham boner position did not specifically increase his back pain. He reported low back

symptoms to his supervisor in June 2016, and his supervisor took him to the medical clinic at Tyson.

On June 3, 2016, Teresa Meyer, R.N., a company nurse for Tyson, evaluated claimant. Ms. Meyer recorded a history in which claimant noted he injured his back performing the ham skinner job duties. Mr. Reh reported that his pain in June 2016 was "recurring from the past." (Joint Exhibit 4, page 24) He reported low back pain that radiated down the back of his legs. (Joint Ex. 4, p. 24) Mr. Reh followed up with Tyson nurses twice in late June 2016.

Mr. Reh returned to the nurse's station at Tyson on July 12, 2016 and again on July 14, 2016. Each of those nurse's notes reflect complaints of low back pain. On July 14, 2016, Tyson's nurse noted that claimant obtained a lumbar MRI through his personal physician's office. (Joint Ex. 4, p. 25)

Tyson's authorized physician, Robert L. Gordon, M.D., evaluated claimant on July 12, 2016. Dr. Gordon's medical record documents complaints of low back pain and bilateral lower extremity complaints. Again, Dr. Gordon's record documents a specific complaint by claimant that he developed back problems operating the ham skinner.

I find that Mr. Reh was aware or reasonably should have been aware of his low back injury on June 3, 2016. By that date, Mr. Reh knew he had a low back injury and knew that it was work related. He had previously experienced low back symptoms in 2013 while operating the ham skinner. His condition improved sufficiently that he returned to work. Any potential injury in 2013 resolved such that Mr. Reh would not have considered it.

However, on June 3, 2016, Mr. Reh's symptoms had returned and were sufficient to warrant him reporting the injury and requesting to be evaluated by the nurse at Tyson. I find that Mr. Reh knew or should have known he had a low back injury and knew or should have known that it was work related on June 3, 2016.

I find that Tyson was clearly aware, or that claimant gave notice, of the alleged June 3, 2016 work injury, by July 12, 2016. By that date, claimant had visited the nurse's station three times and Tyson had scheduled an evaluation with a physician of its choosing. Each of the medical records and providers documented complaints of injury at Tyson operating the ham skinner. Tyson was clearly aware, or at least was given notice by claimant, of the alleged June 2, 2016 injury within 90 days of its manifestation.

As a result of his July 12, 2016 evaluation, Dr. Gordon recommended a job site evaluation to assist in determining causation of claimant's injury. (Joint Ex. 5, p. 43) A physical therapist, John Kruzich, performed the job site evaluation for the ham boner position on September 23, 2016. (Defendant's Ex. I) However, claimant explained again that his low back symptoms increased performing the ham skinner position.

Mr. Kruzich performed a second job site evaluation of the ham skinner position on October 5, 2016. (Def. Ex. J) Dr. Gordon attended the second evaluation of the ham skinner position. (Joint Ex. 5, p. 54) Mr. Kruzich concluded:

> Based upon this job site evaluation, taking into account the composite of physical stressors of posture/kinematics, frequency, exertion, and force, along with the temporal analysis of individual sub-task performance, the causation/precipitation/aggravation/acceleration of a pathological disorder about the lumbar spine region due to the performance of the above referenced essential functions is not biomechanically/medically plausible.

(Def. Ex. J, p. 5)

Dr. Gordon concurred with Mr. Kruzich's analysis, opining, "This job as demonstrated to me, taking into consider [*sic*] his anthropometrics, would not cause or otherwise aggravate a lumbar disorder due to lack of biomechanical factors involving kinematics, force, and frequency." (Joint Ex. 5, p. 54) As a result, Dr. Gordon discharged claimant from his care, opining that claimant had no permanent impairment and no permanent restrictions with regard to a work-related disorder. (Joint Ex. 5, p. 54)

Claimant continued to work at Tyson without restrictions. However, he sought further medical care at Peoples Community Health Clinic. Kiran Ijaz, M.D. evaluated Mr. Reh on April 4, 2017. Dr. Ijaz documented significant low back symptoms. Dr. Ijaz assessed claimant as having lumbago with sciatica on the right side. (Joint Ex. 6, p. 59)

Sara Kane, ARNP, at Peoples Community Health Clinic performed a wellness examination and evaluated Mr. Reh on May 4, 2017. She documented ongoing low back pain and noted it was not a new concern. Ms. Kane documented that the gabapentin prescribed by Dr. Ijaz was not helpful for claimant's symptoms. She documented that claimant's low back condition had deteriorated and discussed with Mr. Reh that it may be unlikely to believe he would become pain free given the nature of his work. (Joint Ex. 6, pp. 62-64)

Mr. Reh sought further treatment with Ms. Kane on October 27, 2017. At that appointment, Ms. Kane again documented ongoing low back and radiating symptoms. She recommended a pain specialist referral. (Joint Ex. 6, pp. 66-69)

The evidentiary record does not contain pain specialist records. However, claimant was later referred to a neurosurgeon, Marietta Walsh, D.O., for evaluation. Dr. Walsh evaluated Mr. Reh on February 8, 2018.

Similar to prior medical providers, Dr. Walsh documented low back pain radiating into both legs. (Joint Ex. 7, p. 77) Dr. Walsh also documents that claimant underwent "multiple pain injections this past fall which did not improve the pain." (Joint Ex. 7, p.

77) Dr. Walsh recommended a new lumbar MRI and an EMG of the lower extremities. (Joint Ex. 7, p. 80)

Dr. Walsh evaluated claimant again on April 5, 2018. Her impression was multilevel disc degeneration of the lumbar spine, a symmetric disc bulge at the L4-5 level. Dr. Walsh recommended surgical intervention and claimant was inclined to proceed if he could financially afford the procedure. (Joint Ex. 7, p. 85)

On May 23, 2018, Dr. Walsh took claimant to surgery and performed a bilateral L4-5 decompression. (Joint Ex. 7, p. 92) Claimant was off work for four weeks from May 23, 2018 through June 19, 2018, as a result of the low back surgery. During that four-week period of time, Mr. Reh was recuperating from his injury, he had not yet achieved maximum medical improvement, and he was not medically capable of performing substantially similar employment to the ham boner job he performed in June 2016.

As of June 19, 2018, Dr. Walsh returned claimant to employment. Claimant returned to work at Tyson and was placed in a boxing job. Mr. Reh has worked this boxing job since June 2018 and continued to work for Tyson at the time of hearing.

In his current positon, Mr. Reh works folding boxes. He testified that he applied for this job because it was easier for his back. Claimant testified that he is afraid to push the stacks of boxes he creates in his current job, but he also testified that it is not painful for him to do so.

Mr. Reh retained Farid Manshadi, M.D. to perform an independent medical evaluation on February 13, 2019. (Claimant's Ex. 6) Dr. Manshadi documents claimant's description of the ham skinner position, including job duties when the line was stuck and claimant had to manually bend, twist, and lift the meat product to perform the job. (Claimant's Ex. 6, p. 20)

Claimant told Dr. Manshadi that he recalled having back pain after one incident where the ham skinner line was stuck and claimant had to manually move the product. Dr. Manshadi documented that claimant's back pain got progressively worse after that event. Dr. Manshadi also acknowledged and reviewed the findings of the job site evaluation performed by Mr. Kruzich, as mentioned above. Considering the mechanics of the job, including the manual work that was required when the line was stuck, Dr. Manshadi opines:

> I believe Mr. Reh's work activities at Tyson, especially when he was performing the job as "Ham Skinner", as well as doing the combo work when he was performing the job "Ham Boner". I believe the jobs that I mentioned were a significant and substantial factor in bringing about Mr.

> Reh's low back injury, which eventually required having surgery by Dr. Welsh [*sic*].

(Claimant's Ex. 6, pp. 22-23)

Dr. Manshadi declared claimant to have achieved maximum medical improvement on February 13, 2019. He opined that Mr. Reh sustained a ten percent permanent impairment of the whole person as a result of the low back injury and surgery performed by Dr. Walsh. (Claimant's Ex. 6, p. 22)

Dr. Manshadi documented ongoing symptoms in claimant's low back as well as a reduced range of motion of the lumbar spine and decreased reflexes in both ankles. Dr. Manshadi recommended avoidance of repetitious bending, stooping or twisting at the waist. He also recommended that claimant not lift more than 15 to 20 pounds. (Claimant's Ex. 6, pp. 22-23)

As I ponder the competing expert causation opinions, I note that Dr. Gordon had the benefit of seeing the job site and job duties at Tyson. This gives him an advantage in visualizing the job demands and assessing causation issues. On the other hand, the job site analysis performed by Mr. Kruzich indicates that claimant would only have to manually move a ham "occasionally" and appears to assume that the conveyor would bring the meat to claimant's workstation. (Joint Ex. J, p. 4) Claimant testified that the line would get stuck several times a month, which I would interpret to be more than just occasionally. In my judgment, Dr. Manshadi's description and assumptions of claimant's job duties as a "Ham Skinner" are more accurate and realistic.

I accept that the ham skinner position, as demonstrated for Mr. Kruzich and Dr. Gordon, likely would not cause low back injury or aggravate pre-existing conditions. However, the manual process described by claimant when the line was stuck several times a month likely was considered more specifically by Dr. Manshadi than Dr. Gordon in formulating a causation opinion. I find Dr. Manshadi's analysis more thorough and convincing in this case. Therefore, I find that claimant has proven that the work he performed at Tyson caused or materially aggravated his low back condition.

Defendant asserts that Mr. Reh's claim is barred by the statute of limitations because it was filed more than two years after the June 3, 2016 injury date. However, I note that Mr. Reh's condition initially caused symptoms in 2013. It improved and he remained working full duty.

In 2016, claimant's symptoms returned. He again sought medical treatment. Again, between June 3, 2016 and October 2016, claimant's symptoms improved, and Dr. Gordon released claimant without permanent impairment or permanent restrictions on October 31, 2016. (Joint Ex. 5, pp. 52-54) On October 26, 2016, the employer sent claimant a letter noting that he had reached maximum medical healing and that he had no permanent impairment. (Defendant's Ex. D, p. 1) Mr. Reh continued working his job as a ham boner until surgery in May 2018.

As noted previously, Mr. Reh was born in another country. He has limited English skills and spoke with medical providers through interpreters. Realistically, he was not in a position, either subjectively or objectively, to know that his low back condition was going to have a permanent adverse impact on his employment by October 2016.

Mr. Reh had previously experienced back symptoms in 2013, improved, and continued working. In 2016, when the back symptoms returned and worsened, he sought medical treatment. Tyson's physician documented that treatment was successful and it was noted that Mr. Reh was notably improved in October 2016. Claimant continued working full-time and full-duty after October 2016. The treating physician and Tyson were both telling him that he had no permanent impairment or permanent work restrictions. Objectively, from a layperson's perspective, it is not reasonable to have expected Mr. Reh be believe or know that the June 2016 injury would have a permanent adverse impact on his employment by mid-October 2016.

After completing its investigation, the employer issued a denial letter to claimant in December 2016. On December 6, 2016, Tyson notified Mr. Reh that it was denying his injury. It indicated that the Job Site Analysis and Dr. Gordon concluded that claimant's low back and leg symptoms are "not caused or aggravated by your work activities at Tyson Foods." (Defendant's Ex. E, p. 1) As part of the denial letter, the employer notified claimant that he had a "right to file a claim with the Iowa Workers [*sic*] Compensation Commissioner." (Defendant's Ex. E)

Arguably, as of his receipt of the denial letter, claimant would or should understand that his injury might be compensable and that he would need to take action to protect his rights. I find that the earliest realistic date that claimant knew or should have known that his injury would have a permanent adverse impact and was compensable would be the date of the denial letter, December 6, 2016. I find that claimant filed his original notice and petition with this agency on August 6, 2018.

Mr. Reh seeks an award of temporary disability, or healing period, benefits. With respect to this claim, I find that Mr. Reh was off work following surgery from May 23, 2018 through June 19, 2018. (Hearing Report) The missed work was the result of the low back surgery caused by claimant's employment activities at Tyson. During this period of absence from work, Mr. Reh was not medically capable of performing substantially similar work as a ham skinner or ham boner.

Only one physician, Dr. Manshadi, has offered an opinion that claimant is at maximum medical improvement. Dr. Manshadi opined that maximum medical improvement occurred on February 13, 2019. (Claimant's Ex. 6, p. 22) I accept that undisputed opinion and find maximum medical improvement occurred on February 13, 2019.

Mr. Reh also asserts a claim for permanent partial disability benefits. In the hearing report and in his post-hearing brief, Mr. Reh asserts that he is entitled to a ten

percent industrial disability award. Defendant challenges whether Mr. Reh is entitled to any permanent disability and, if so, urge an award of not more than five percent industrial disability.

Claimant testified that he has ongoing symptoms as of the date of hearing. Specifically, Mr. Reh testified that he cannot sit for too long, cannot stand for more than 1-2 hours at a time, and that he cannot walk long distances. Mr. Reh also testified that it adversely affects his back to push or pull things and that he experiences back pain if he lifts or picks up things. Mr. Reh testified he continues to have difficulties carrying groceries.

As noted, on the hearing report and in his post-hearing brief, Mr. Reh contends that he sustained a ten percent industrial disability as a result of the June 6, 2016 work injury. Given that claimant has returned to work at Tyson, has no actual reduction in his wages, and was fully released to return to work without medical restrictions by his treating surgeon, I concur with claimant that his future loss of earning capacity is minimal at this time. Considering claimant's age, permanent impairment rating, lack of permanent restrictions, his communication barriers, educational and employment backgrounds, ability to return to work, motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, as well as claimant's contention of a ten percent industrial disability, I find that claimant sustained a ten percent loss of future earning capacity as a result of the June 3, 2016 injury.

Mr. Reh also asserts a claim for payment or reimbursement of past medical expenses. Claimant attached a medical bill summary to the hearing report. Defendant stipulates that the fees and prices for the medical care are reasonable. Defendant also reasonably stipulates that the treating medical providers for the disputed medical expenses would testify that the care rendered was reasonable and necessary. Finally, defendant stipulates that the medical bills in dispute are causally related to treatment of Mr. Reh's low back condition. Having found that Mr. Reh proved a causal connection between his injury and his job duties, I find that the disputed medical expenses are also causally related to the alleged work injury.

CONCLUSIONS OF LAW

The initial disputed issue for resolution is whether Mr. Reh has proven he sustained a cumulative injury, which arises out of and in the course of his employment, on either June 3, 2016 or May 23, 2018.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the

injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

I found that Mr. Reh's low back condition was aggravated and ultimately caused by work duties in the ham skinner job, particularly when the conveyor line was stuck, on a cumulative basis at Tyson. Therefore, I conclude that Mr. Reh proved that he sustained an injury to his low back that arose out of and in the course of his employment with Tyson.

The next disputed issue is the proper date of injury for this claim. The Iowa legislature made significant substantive changes to Iowa's workers' compensation statutes, which took effect in July 2017. One of the injury dates, June 3, 2016, falls before the statutory change. The second date of injury, May 23, 2018, occurs after the statutory change. For purposes of a cumulative injury date and for purposes of the asserted notice defense, the applicable date of injury may make a significant difference in this case. Therefore, the next issue to be decided is the proper injury date for this claim.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Having found that Mr. Reh, as a reasonable person, knew or should have known that he sustained a low back injury and that it was potentially causally related to his employment on June 3, 2016, I conclude that the manifestation date for the cumulative injury is June 3, 2016. I further conclude that claimant proved that he sustained an injury that arose out of and in the course of his employment on June 3, 2016.

Having concluded that the proper injury date is June 3, 2016, I must address defendant's affirmative defenses. Defendant asserts a notice defense pursuant to Iowa Code section 85.23.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

In this case, Mr. Reh completed a team member statement of injury on June 3, 2016 with the assistance of the company nurse. (Joint Ex. 1, p. 5) That form indicates that claimant reported the injury on June 3, 2016. The employer knew on June 3, 2016 that Mr. Reh was asserting a work injury to his low back. Claimant reported a work-related low back injury at least three times to Tyson's nurse, as well as to Tyson's authorized physician by July 12, 2016.

Therefore, I conclude the employer had actual notice of the alleged injury of the alleged injury within 90 days of the date claimant knew or should have known that the

injury likely had a serious adverse impact on his employment. I conclude that the employer's actual knowledge defeats any notice defense. Iowa Code section 85.23.

Furthermore, claimant clearly gave the employer notice and requested medical care for his low back on June 3, 2016. The employer provided in-house medical care to claimant and documented that care via formal reports of injury and medical records. Claimant reported a work-related low back injury to Tyson's nurse at least three times and to the authorized physician all by July 12, 2016. The treatment records all document notice occurred within 90 days of the date claimant knew or should have known that his low back injury would have a serious adverse impact on his employment. Therefore, I found that claimant gave timely notice of his injury. I conclude that the employer failed to establish its affirmative notice defense pursuant to Iowa Code section 85.23.

Defendant has also asserted a statute of limitations defense. Defendant contends that claimant's injury, if as I have found occurred on June 3, 2016, is barred by the statute of limitations found in Iowa Code section 85.26(1). Defendant asserts that weekly benefits were not paid to claimant for that date of injury. Therefore, claimant was required to file his original notice and petition within two years of the injury date or the claim is barred by the statute of limitations. Iowa Code section 85.26(1).

Defendant accurately points out that claimant's original notice and petition was filed on August 6, 2018. Defendant also accurately points out that the petition was filed more than two years after the injury date. Therefore, defendant contends that the claim is barred by the statute of limitations.

Claimant asserts that the statute of limitations is tolled by the discovery rule and that his claim remains viable. As noted in the prior discussion of the notice defense, the period for filing a claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Claimant points out that Mr. Reh is a native of Thailand. He does not read, write, or speak English. Claimant contends that, when viewed from claimant's perspective and with his language limitations, the statute of limitations did not begin to run on June 3, 2018. Instead, claimant relies upon the discovery rule to toll the statute of limitations.

Mr. Reh also accurately points out that his symptoms waxed and waned and that they actually reduced between June 3, 2016 and October 31, 2016. He contends that this resolution of symptoms, coupled with improvement after the initial onset of symptoms in 2013 demonstrates that he was not objectively aware that the injury likely would have a serious adverse impact on his employment in June 2016. In fact, Dr. Gordon released claimant to return to work without restrictions and without permanent impairment on October 31, 2016. Based upon this full duty release, I found that Mr. Reh would not, as an objectively reasonable person, understand that his injury would

have a serious or permanent adverse impact on his employment as of October 31, 2016.

Instead, I found, at the earliest, claimant would have reasonably understood the potential permanent adverse impact of the injury on his employment upon receipt of the December 6, 2016 denial letter from the employer. Having found that Mr. Reh, as a reasonable person, knew or should have known that his injury would have a serious adverse impact on his employment no sooner than the issuance of the December 6, 2016 denial letter by Tyson, I conclude that the employer failed to establish its affirmative statute of limitations defense.

Given that defendant's affirmative defenses fail, I must consider the specific benefits claimant seeks. Mr. Reh asserts that he is entitled to temporary total disability, or healing period benefits, for the period he was off work after his surgery. Specifically, Mr. Reh asserts that he is entitled to an award of healing period benefits from May 23, 2018 through June 19, 2018.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Having found that Mr. Reh was off work from May 23, 2018 through June 19, 2018, that he was not medically capable of working during this period of time, and that he did not achieve maximum medical improvement until February 13, 2019, I conclude that claimant proved entitlement to healing period benefits from May 23, 2018 through June 19, 2018. Iowa Code section 85.34(1).

Claimant also asserts that he sustained permanent disability as a result of his low back injury. Defendant contests whether claimant sustained permanent disability. Having found that claimant proved a permanent disability as a result of the June 3, 2016 work injury, I conclude that claimant is entitled to an award of permanent disability benefits in some amount. Iowa Code section 85.34(2)(u) (2016).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u) (2016). Mr. Reh's injury is to his low back. The back is not among the enumerated scheduled member injuries in Iowa Code section 85.34(2). Therefore, the back is considered an unscheduled injury that is compensated with industrial disability benefits pursuant to Iowa Code section 85.34(2)(u) (2016).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having considered the situs of claimant's injury, the severity of the injury, claimant's age, educational background, employment history, limited English skills, his ability to return to the same employment, his pre-injury and post-injury earnings, as well as claimant's motivation, permanent impairment rating, permanent work restrictions, and claimant's assertion with respect to permanent disability entitlement, I found that claimant both claimed and proved a ten percent loss of future earning capacity as a result of the June 3, 2016 work injury. This is equivalent to a ten percent industrial disability. Iowa Code section 85.34(2)(u).

As noted above, an unscheduled injury is compensated on a 500-week schedule. Therefore, claimant is entitled to an award of 50 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Having determined that defendant is obligated to pay permanent disability benefits, I must determine when those benefits should commence. As noted above, permanent disability commences upon termination of the healing period. Iowa Code section 85.34(1) (2016). In this instance, claimant proved entitlement to a healing period from May 23, 2018 through June 19, 2018. Accordingly, I conclude that permanent partial disability benefits commence on June 20, 2018. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Mr. Reh attached a medical expense summary to the hearing report and asserts a claim for past medical expenses. Defendant stipulated that the medical charges were reasonable and that the medical treatment rendered was reasonable and necessary. (Hearing Report) The employer further stipulated that the medical expenses were causally related to the medical condition upon which the claim of injury was based.

(Hearing Report) I found that claimant proved he sustained a low back injury arising out of and in the course of his employment. Therefore, I also found that the disputed medical expenses were causally related to that work injury.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

I acknowledge defendant's argument that it should not be responsible for the disputed medical expenses because claimant did not report his ongoing symptoms or seek additional authorization of medical care through the employer. However, defendant urged this argument under the assumption that the claim would be compensable, if at all, under the May 23, 2018 injury date. Having concluded that the proper injury date was June 3, 2016, I analyze this issue under that injury date and the applicable law on June 3, 2016.

> Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

Defendant knew about the alleged injury in 2016. The employer investigated the claim. Defendant issued a knowing denial of the claim in December 2016. Defendant cannot challenge authorization for medical expenses incurred after its denial. The employer never accepted this claim after its initial denial. Therefore, defendant had no legal basis to control claimant's medical care after it denied liability for the June 2016 injury. Brewer-Strong v. HNI Corporation, 913 N.W.2d 235, 244-245 (Iowa 2018).

Therefore, I conclude that the employer does not have a viable authorization defense and that all disputed medical expenses should be awarded. Iowa Code section 85.27; Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010); R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003). I conclude that defendant is responsible for the disputed medical expenses.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay healing period benefits to claimant from May 23, 2018 through June 19, 2018.

Defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on June 20, 2018.

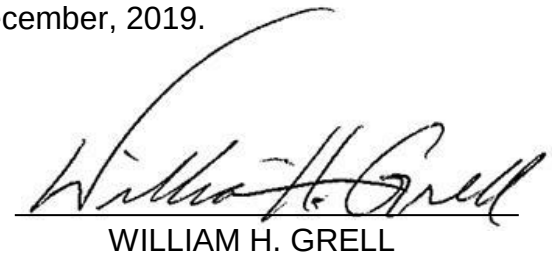
All weekly benefits shall be paid at the stipulated rate of four hundred seventy-six and 42/100 dollars ($476.42) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay any outstanding medical expenses directly to medical providers, reimburse any third-party payer for past medical expenses awarded, reimburse claimant for any out-of-pocket payments made by claimant, and shall hold claimant harmless for all past medical expenses summarized in the attachment to the hearing report.

Defendant shall timely file all reports as required by 876 IAC 11.7.

Signed and filed this 13th day of December, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John S. Pieters (via WCES)

Jason Wiltfang (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.